

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID L. EATON, SR.
Claimant

VS.

SCHWAN'S HOME SERVICE, INC.
Respondent

AND

HARTFORD INS. CO. OF THE MIDWEST
Insurance Carrier

Docket No. 1,041,298

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) and claimant requested review of the October 22, 2010, Post-Award Medical Award entered by Administrative Law Judge Bruce E. Moore. The Acting Director, Seth Valerius, appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of retired Board Member Carol Foreman. Kelly W. Johnston, of Wichita, Kansas, appeared for claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent. This claim was placed on the Board's summary calendar for determination without oral argument.

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proving he was entitled to designation of a treating physician to monitor his headaches and other health issues. The ALJ awarded claimant's attorney a total of \$1,215 in post-award attorney fees and \$196.74 in expenses.

The Board has considered the record and adopted the stipulations listed in the Post-Award Medical Award.

ISSUES

Claimant requests review of the ALJ's denial of the designation of Dr. Gary Williams to be claimant's authorized treating physician and the ALJ's finding that claimant did not prove he was in need of medical care at the present time. Claimant renewed his request for \$2,100 in attorney fees and \$194.50 in expenses.

Respondent asks that the Board affirm the ALJ's finding that claimant failed to establish he was entitled to have Dr. Williams named as an authorized treating physician to monitor his headaches and other post-award medical treatment. Respondent further contends that claimant did not suffer a traumatic brain injury and that claimant's headaches preexisted his work-related accident. Respondent asks the Board to reverse the ALJ's award of attorney fees in this case, arguing that claimant has no need for medical treatment and his demand was not reasonable.

The issues for the Board's review are:

- (1) Did claimant sustain his burden of proving that he is in need of medical treatment?
- (2) Is claimant entitled to designation of an authorized treating physician to monitor his post-award medical care?
- (3) Is claimant entitled to attorney fees and costs? If so, in what amount?

FINDINGS OF FACT

On December 8, 2007, claimant was injured while working at respondent when he fell from a truck. He landed on the ground, with the back of his head hitting concrete. He has been complaining of headaches since the accident. In a preliminary hearing held October 14, 2008, claimant said he would have pain in the back of his neck and then it would move up and he would get a severe headache.

On April 15, 2010, the ALJ found that claimant suffered a 5 percent impairment of function to the body as a whole as a result of the December 8, 2007, work-related injury. On May 10, 2010, claimant filed an Application for Post Award Medical, in which he asked for "[m]onitoring of permanent injuries, medication, office visits and lab work under direction of Dr. Gary Williams."¹ Claimant testified he is asking for medical treatment for his headaches. At the post-award medical hearing, claimant said that he suffers headaches that start in his neck and move up over the top of his head down to and sometimes

¹ Form K-WC E-4, Application for Post Award Medical filed May 10, 2010.

including his eyes. He claims the headaches occur three to four times a week and at times three to four times a day. On a pain scale, the pain ranges from a 2 to a 10. Claimant believes the headaches are becoming more frequent and more intense since his testimony at the regular hearing in January 2010.

Respondent has offered to allow claimant to report to its first aid station and consult with one of the nurses when he has a headache and needs more over-the-counter medications. If the nursing staff determines more than over-the-counter medication is necessary or that claimant needs to see a doctor, a nurse would schedule claimant to see the company physician, Dr. James Shafer. Claimant testified, however, that he did not trust Dr. Shafer. He said that after his accident, Dr. Shafer did not look at the back of his head. Further, claimant said that Dr. Shafer told him his headaches were not related to the fall. Claimant wants Dr. Williams to be authorized as his treating physician. Claimant has been seeing Dr. Williams since October 5, 2007, and said that Dr. Williams treats him well and is very trustworthy.

Dr. Williams, a board certified family practitioner, first began treating claimant in October 2007. On September 15, 2009, he and claimant discussed claimant's headache complaints. Claimant told Dr. Williams he had been having the headaches since his head injury in December 2007. The location of the headaches has remained the same, being in the posterior occipital region of his head. Dr. Williams testified that claimant told him the headaches were well controlled. Claimant was taking over-the-counter headache relief medicines, such as Tylenol. Dr. Williams recommended claimant continue to take over-the-counter medicines to manage his headaches.

Claimant told Dr. Williams he had previously benefitted from injections in the neck region. Dr. Williams' assessment of claimant's current situation regarding headaches is that they are sufficiently managed by over-the-counter medication. Dr. Williams said claimant may need trigger point injections or epidural injections in the future, but he did not recommend them now. At the present time, Dr. Williams believed claimant was in need of being monitored for his continuing headaches.

Dr. Williams did not believe respondent's offer of treatment was a reasonable approach to monitoring claimant's headaches because, with claimant's history, Dr. Williams did not think evaluation from a nurse should be the first part of his care. If claimant was having new symptoms, a change in his symptoms, or a progression of the symptoms, Dr. Williams believes he should be seen by a physician. Dr. Williams agreed that Dr. Shafer would be an acceptable physician to do that. Dr. Williams agreed that Dr. Shafer is a competent physician.

Claimant admitted he had headaches every once in a while before his accident at respondent. His primary care physician before Dr. Williams was Dr. Neil Rosen of Arlington, Texas. Dr. Rosen's medical records indicate that claimant complained of

headaches on February 9, 1999; December 13, 1999; July 27, 2005; December 9, 2005; and May 18, 2007.

It is Dr. Williams' opinion that claimant's fall in December 2007 caused the headaches claimant now has that begin at the back of his head. Dr. Williams admitted he was not aware that claimant had treatment and evaluation for headaches before the December 2007 accident. But Dr. Williams said he would not change his opinion because most people have headaches at some point in their life, and it would be normal for claimant to have seen a physician previously for headaches. Dr. Williams agreed that claimant has different types of headaches and not all of his headaches are related to his neck problem or traumatic brain injury. He expected claimant to have headaches in the future that are unrelated to his injury, such as a sinus headache or a migraine. But if claimant has headaches in the posterior occipital region, of the nature that he has been having since the injury, more likely than not those are from his injury.

Unrelated to the accident, claimant suffers from chronic obstructive pulmonary disease (COPD), diabetes and hypertension. Dr. Williams ordered a sleep study on claimant on April 21, 2008. Findings from those tests showed claimant had sleep apnea and severe hypoxemia. Hypoxemia, which is a lack of sufficient oxygen to the brain, can cause headaches. Claimant is on oxygen for hypoxemia 24 hours a day, 7 days a week.

Dr. Williams testified that if claimant came in to see him for a headache, he would only bill respondent if the pain was in claimant's neck or he had a posterior occipital headache that progressively worsened and during the office visit he and claimant were primarily visiting about the headache. If claimant were to see Dr. Williams primarily for his COPD or sleep apnea, or if claimant's headache was in his sinus or was fever related, the bill would not go to respondent.

Claimant's attorney originally requested an award of \$2,100 in attorney fees and \$194.50 in expenses for the prosecution of this post-award medical application. The ALJ awarded him \$1,215 in attorney fees and \$196.74 in expenses. Claimant asks for the full \$2,100 in attorney fees. Respondent argues that claimant's request for medical care was premature and should not have been filed and that respondent made a good faith effort to provide claimant's requested medical treatment, and, therefore, claimant's attorney is not entitled to attorney fees or expenses.

PRINCIPLES OF LAW

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.²

K.S.A. 2009 Supp. 44-510k states in part:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

....
(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

ANALYSIS

Claimant seeks authorization of his personal physician, Dr. Gary Williams, to provide monitoring of his work-related injuries, medications and laboratory testing. Dr. Williams is currently providing claimant with treatment for several non-work related conditions. As for claimant's headaches, which both claimant and Dr. Williams attribute to claimant's work-related accident, Dr. Williams testified that those can be controlled with over-the-counter pain medications.

Although disputing the need for treatment, respondent has nevertheless authorized claimant to be treated by its plant physician, Dr. Shafer, who, coincidentally, is Dr. Williams' partner. Claimant objects to Dr. Shafer, in part because he has to go through and be seen

² K.S.A. 2009 Supp. 44-501(a).

by the plant nurse before he can be seen by Dr. Shafer, and because claimant does not have confidence in Dr. Shafer based upon his prior experience with that doctor. Nevertheless, it cannot be said that respondent is refusing to provide claimant with authorized medical treatment. As such, claimant's motion is more about choice of physician rather than for the granting of post award medical treatment.

Under the Kansas Workers Compensation Act, the employer is responsible for providing medical care to an injured worker for the work-related injuries. The Act further provides that the employer has the right to direct that medical care in the first instance by naming the authorized provider or providers. That right does not end with the entry of an award. K.S.A. 2009 Supp. 44-510h gives the employee an avenue for seeking a change of physician if it is shown that the services of the health care provider furnished by the employer is not satisfactory. Here, claimant has refused to avail himself of the services of the health care providers furnished by respondent. Therefore, it cannot be said that those services are unsatisfactory. Even Dr. Williams acknowledged that Dr. Shafer is competent to treat claimant for his work-related headaches.

As for claimant's request for attorney fees and expenses incurred in connection with this post-award proceeding, the ALJ reasoned:

While Claimant did not succeed on his application, there is no evidence the request was presented in bad faith. To deny attorneys fees on an unsuccessful application for post-Award medical treatment might "chill" the filing of other applications where success is not guaranteed, but the claim is presented in good faith. Claimant is entitled to attorneys fees and expenses, but is *not* entitled to recover the fee paid to Dr. Williams for his testimony.³

The Board agrees with the ALJ that attorney fees and expenses should be awarded and agrees with the amounts so awarded.⁴ Any request for additional amounts for subsequent services should first be presented to the ALJ.⁵

³ ALJ Post Award Medical Award at 5 (filed October 22, 2010).

⁴ Claimant's Affidavit filed September 10, 2010, itemizes \$511.74 in expenses. Of this amount, \$315 was for "deposition and consultation charges" by Dr. Gary Williams. Subtracting the \$315 from \$511.74 leaves \$196.74, which is the amount of expenses awarded by the ALJ. The Affidavit also itemizes nine hours of attorney time. The ALJ awarded \$1,215 in attorney fees, which computes to an hourly rate of \$135.

⁵ Although it is not clear, it does not appear that the claimant's attorney's request for an additional 1.5 hours of time that was set out in Mr. Johnston's letter of October 7, 2010, was included in the figure awarded by the ALJ.

CONCLUSION

(1) and (2) Respondent has designated Dr. Shafer as claimant's authorized treating physician. Claimant's request that Dr. Williams be authorized is denied.

(2) Claimant is entitled to attorney fees and costs. The ALJ's Post-Award Medical Award is affirmed in this regard.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated October 22, 2010, is modified to clarify that respondent has authorized Dr. James Shafer to treat claimant for his work-related injuries but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge